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In the
Supreme Court of the United States

OCTOBER TERM, 1964

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No. 320

ERNEST L. ALLEN,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Ernest L. Allen, the Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above case on June 25, 1964.

Opinions Below

The opinion of the Court of Appeals for the First Circuit is reported at . F2d .

Jurisdiction

The judgment of the Court of Appeals for the First Circuit was made and entered on June 25, 1964, and a copy thereof is appended to this petition in the Appendix at p. 9. The jurisdiction of this Court is invoked under Title 28, United States Code, s.1254(1).

Questions Presented

In a criminal trial for alleged bribery, the District Court admitted into evidence certain secretly made electronic recordings of a conversation which took place between petitioner and an Internal Revenue Agent in petitioner's private office. The petitioner objected to the admission of these recordings which were made without his knowledge and without authority of a search warrant. The Court of Appeals affirmed the action of the District Court. The questions presented are:

1) Were the recordings made by the Government the product of an unreasonable search and seizure within the constitutional prohibitions of the Fourth Amendment?

2) Did the recordings made by the Government violate defendant's right of freedom from self-incrimination as guaranteed him by the Fifth Amendment?

Constitutional Provisions and Statutes

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched.

and the persons or things to be seized." USCA, Constitution, Amendment IV, p. 102.

"No person shall be held to answer for a capitol, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation." USCA, Constitution, Amendment V, p. 297.

"(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity with intent . . . (3) to induce such public official or person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty . . . shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States . . ." Title 18, USCA, s. 201(b)(3), p. 11, 1963 supp.

Statement

Petitioner was indicted in the United States District Court for the District of New Hampshire on September 17, 1963. The indictment contained three (3) counts, alleging violations of Title 18, USC, s. 201(b)(3). (R., p. 5, 6).

On May 24, 1963 one William N. Ferguson, an Internal Revenue Agent, commenced an audit of petitioner's income tax returns for the calendar years 1960 and 1961 (R., p. 132, 147). He was told at this time that petitioner had undergone a previous audit in 1958 which had resulted in an adjustment of approximately $500 (R., p. 132, 149).

Ferguson commenced his audit, and later in the day the petitioner inquired if same could not be completed in one day (R., p. 199). Upon receiving a negative answer, petitioner stated that he desired to make an adjustment (R., p. 199). Petitioner further inquired if such adjustment would not come to around $500 (R., p. 199). Ferguson advised that it would and asked if petitioner had the cash on hand (R., p. 199). Petitioner then produced an envelope containing money which his wife had set aside for a vacation (R., p. 199, 200).

The Agent then indicated that he wanted additional records relative to the purchase and sale of securities (R., p. 200). Petitioner agreed to get these together, and on the evening of May 25, 1963 he telephoned Ferguson to advise him that he had found these papers (R., p. 200, 201).

Immediately upon leaving petitioner's office on May 24, 1963, Ferguson notified the Regional Inspector's Office, Internal Revenue Service, that petitioner was attempting to bribe him (R., p. 9, 10, 137, 158). He received instructions from this office, and on May 26, 1963 he gave a statement to one of its inspectors (R., p. 12, 15, 16, 140). He was subsequently instructed to report to a certain motel in Nashua, New Hampshire on the early morning of May 27, 1963 (R., p. 17, 140).

On the morning of May 27, 1963 various electronic devices were secreted on Ferguson's person at the motel (R., p. 18, 19, 72, 73, 74, 75). Ferguson then telephoned petitioner and made an immediate private appointment with him (R., p. 19, 141).

From the motel Ferguson went to petitioner's office where the two discussed the petitioner's possible tax liability and the latter's desire to make an adjustment of same (Govt. Exh. 9). Petitioner gave Ferguson $500, and Ferguson made out a purported adjustment and advised petitioner he would come back with the proper forms in the near future (Govt. Exh. 9).

Prior to his entry into petitioner's office Ferguson had been instructed to discuss a settlement with petitioner but not to reach a legitimate adjustment (R., p. 35, 36, 38, 43, 44, 55, 56, 57, 58, 141). The conversation between Ferguson and petitioner was secretly recorded (Govt. Exh. 9). No warrant was procured prior to Ferguson's entry into the petitioner's office (R., p. 46).

The Court admitted the recording into evidence over the vigorous objection of petitioner (R., p. 172, 173). The jury found petitioner not guilty on the first two counts of the indictment which alleged offers to bribe on May 24, 1963 and May 25, 1963 (R., p. 5, 6). A verdict of guilty was returned on the third count which alleged an actual bribe on May 27, 1963 (R., p. 6).

On appeal, the judgment was affirmed on the ground that the recordings were properly admitted into evidence.

Reasons For Granting The Writ

The decision below should be reviewed because it involves a deprivation of basic constitutional rights in a field in which the most recent decisions of this Court indicate the law to be unsettled.

1. The entry into petitioner's office on May 27, 1963 was for the purpose of gathering evidence (R., p. 48). No warrant was procured for this entry and it was not incident to an arrest (R., p. 45, 46).

"The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all intrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights." *Weeks* v. *United States*, 232 U.S. 383, 391, 392, 58 L. Ed. 652, 655, 34 S. Ct. 341.

Searches for and seizures of mere evidence as opposed to the fruits and instrumentalities of crime are impermissible under any circumstances *United States* v. *Lefkowitz*, 285 U.S. 452, 76 L. Ed. 877, 52 S. Ct. 420. Here, the object sought was a statement by petitioner which was designed to demonstrate criminal intent. Incriminating oral declarations of fact are objects of search which are subject to the restrictions of the 4th Amendment *Nueslein* v. *District of Columbia*, (C.A., D.C., 1940) 115 F2d 690, 692; *Harris* v. *United States*, 331 U.S. 145, 153, 91 L. Ed. 1399, 67 S. Ct. 1098.

Furthermore, the entry here was made on the basis of mere conclusions by a federal agent that petitioner was attempting to offer a bribe. The verdicts of the jury on the first two counts of the indictment clearly demonstrate that such conclusions were unfounded. No warrant was procured and it is obvious that had one been sought it would not have met the scrutiny of a neutral and disinterested magistrate. *Aguilar* v. *Texas*, 12 L. Ed. 2d 723.

The actions of the Government agents constituted a gross invasion of the petitioner's right of privacy. A search and seizure wherein admission is obtained by stealth is as much a violation of petitioner's constitutional rights as is one wherein entrance is gained by force *Gouled* v. *United States*, 255 U.S. 298, 305, 65 L. Ed. 647, 651, 41 S. Ct. 261.

2. The secret recording of petitioner's conversation with Ferguson compelled petitioner to be an unwilling witness against himself. The 4th and 5th Amendments are intimately related and they express supplementary phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy *Mapp* v. *Ohio*, 367 U.S. 643, 657, 6 L. Ed. 2d 1081, 1091, 81 S. Ct. 1684.

The object of the 5th Amendment was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. This privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard. *Counselman* v. *Hitchcock*, 142 U.S. 547, 562, 35 L. Ed. 1110, 1114, 12 S. Ct. 195. The Amendment forbids that the accused become the unwilling source of evidence against himself under any circumstances. *Gouled* v. *United States*, 255 U.S. 298, 306, 65 L. Ed. 647, 651, 41 S. Ct. 261; *Boyd* v. *United States*, 116 U.S. 616, 29 L. Ed. 746, 6 S. Ct. 524.

And the ambiguity of the recordings (Govt. Exh. 9) only serves to demonstrate the violation of the constitutional

privilege which is designed to protect those who otherwise might be ensnared by such circumstances. *Slochower* v. *Board of Education of New York*, 350 U.S. 551, 557, 558, 100 L. Ed. 692, 700, 76 S. Ct. 637.

Certainly, if the right of counsel guaranteed by the 6th Amendment forbids the use of such recordings (*Massiah* v. *United States*, U.S. , 12 L. Ed. 2d 246) then the guarantees of the 4th and 5th Amendment equally require that this type of evidence should be excluded.

Conclusion

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Appendix

United States Court of Appeals
For the First Circuit

No. 6298.

ERNEST L. ALLEN,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE.

Before WOODBURY, *Chief Judge,* and HARTIGAN and ALDRICH, *Circuit Judges.*

Shane Devine and *J. Murray Devine*, with whom *Devine, Millimet, McDonough, Stahl & Branch* was on brief, for appellant.
Paul L. Normandin, Assistant U. S. Attorney, with whom *John D. McCarthy*, Assistant U. S. Attorney, was on brief, for appellee.

OPINION OF THE COURT.

June 25, 1964.

PER CURIAM. Two primary contentions are advanced on this appeal from a judgment of sentence imposed following a jury verdict of guilty of giving a sum of money as a bribe to an internal revenue agent in violation of Title 18 U.S.C. § 201(b)(3). These contentions are that the evidence is insufficient to support the verdict and that the court below erred in admitting tape recordings of a conversation between the appellant and the agent into evidence as an exhibit.

An examination of the record discloses ample evidence to support the verdict. The tape recordings were obtained under similar, indeed practically identical, circumstances as the tape recordings considered and held admissible in evidence by this court in *Gorin* v. *United States*, 313 F.2d 641 (C.A. 1), *cert. denied*, 374 U.S. 829 (1963), and by the Supreme Court of the United States in *Lopez* v. *United States*, 373 U.S. 427, 437, 440 (1963).

Secondary contentions advanced on the appellant's behalf, such as entrapment as a matter of law, fatal variance between the proof and the indictment and prejudicial argument by the prosecuting attorney, have too little substance to invite discussion.

Judgment will be entered affirming the judgment of the District Court.

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ERNEST L. ALLEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 320

ERNEST L. ALLEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. 9) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1964 (R. 276). The petition for a writ of certiorari was filed on July 23, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a tape recording of petitioner's conversation with an Internal Revenue agent was admissible

in evidence to corroborate the agent's testimony relating to a bribe, where the conversation was transmitted by equipment carried by the agent when he entered petitioner's office by consent.

STATEMENT

After a jury trial in the United States District Court for the District of New Hampshire, petitioner was convicted of giving, on May 27, 1963, a $500 bribe to an Internal Revenue agent, in violation of 18 U.S.C. 201(b)(3).[1] He was sentenced to imprisonment for two years (six months of which was to be served and the execution of the remainder suspended with probation commencing after the sentence served) and to pay a fine of $1500 (R. 273). The court of appeals affirmed (R. 275-276).

At trial the government offered, *inter alia*, the testimony of Internal Revenue Agent Ferguson as to the conversation and transaction with petitioner on May 27, 1963. To corroborate his testimony, a tape recording of the May 27 conversation was played for the jury (R. 180-181). The circumstances leading up to the taking of this recording are as follows:

On May 24, 1963, agent Ferguson commenced an audit of the income tax returns of petitioner, an optometrist, at the latter's office (R. 131). That afternoon, petitioner, ascertaining that the examination could not be completed that day, placed an envelope in front of the agent and stated, "Take this and finish

---

[1] Petitioner was acquitted on charges alleging offers to bribe on May 24 and 25, 1963.

the examination today". When the agent protested that he could not, petitioner urged "Go ahead, take it. No one will know. You can say these are papers" (R. 136). The agent noticed the outline of money in the envelope and asked to be allowed to think it over (R. 136). Petitioner made arrangements for the agent to call him that night. (R. 136-137). The agent reported the attempted bribe to the Service (R. 137, 14-16).

On May 25, petitioner called agent Ferguson at home, said he understood that Ferguson had to satisfy superiors and added that "There will be some more papers that will interest you" (R. 139).

On May 27, Internal Revenue inspectors outfitted agent Ferguson with a "Fargo" radio device capable of transmitting to a tape recorder an accurate and authentic reproduction of a conversation (R. 19, 77, 119, 140). Agent Ferguson then called petitioner, who assured the agent that he would be alone in his office and would lock the door to make sure (R. 141). Before leaving for petitioner's office, agent Ferguson was instructed to refer to the envelope petitioner had offered him, ask what he had in mind, and reach a proposed or estimated tax deficiency. In the event petitioner did not acknowledge the envelope, the agent was instructed to continue his normal audit (R. 140-141).

When agent Ferguson entered petitioner's office, petitioner locked the door (R. 142-143). In the ensuing conversation, which was recorded, the two men discussed the sum of $500. Petitioner indicated that he had not listed some of his stock transactions on

his returns and did not want to get involved in a lengthy audit. The agent estimated a tax deficiency of $300 (R. 143). Petitioner then gave the agent $500 in five packets of ten dollar bills (R. 144, 25).

ARGUMENT

As the court below noted, the tape recording of petitioner's conversation with the agent was obtained under circumstances indistinguishable from those involved in *Lopez* v. *United States*, 373 U.S. 427. In that case this Court declined to hold that the offer of the bribe to a revenue agent was a constitutionally protected communication. It ruled that the taxpayer took the risk that the offer would be accurately reproduced in court whether by faultless memory or mechanical recording. 373 U.S. at 438-439. Petitioner does not attempt to distinguish *Lopez* and advances no reasons why that decision should not be followed. His contentions do not warrant review.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1964.

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